Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-942

FRANK REYNOLDS,

Petitioner

vs.

JOSEPH L. WETLI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW AND JURISDICTION

The opinions below and jurisdictional requirements are adequately set forth in the Petition. The opinions below are reproduced in Petitioner's Appendix and, therefore, are not reproduced herein.

QUESTION PRESENTED

Whether the imposition of criminal sanctions, pursuant to Section 1531.02 of the Ohio Revised Code, absent a finding of *scienter*, for the unlawful possession of undersized fish violates the rights of Petitioner, a licensed commercial fisherman, to due process of law and to equal protection under the law as guaranteed by the Fifth and Fourteenth Amendments.

STATEMENT OF THE CASE

On September 9, 1974, Petitioner was found guilty of the unlawful possession of undersized fish, in violation of Section 1531.02 of the Ohio Revised Code, which were concealed upon a boat, the Bay Hawk, owned by Petitioner. An appeal was unsuccessfully pursued through the state court system resulting in the affirmance of this conviction. In his Statement of the Case, however, Petitioner fails to fully set forth the facts upon which this conviction was based. As determined by the Ohio Court of Appeals upon review and as indicated by the federal district court in its Order denying Petitioner's application for a writ of habeas corpus (reproduced in Petitioner's Appendix, pp. ii, iii), the pertinent facts supporting Petitioner's conviction are that Petitioner was at all times a commercial fisherman licensed under the laws of the State of Ohio; that Petitioner is the owner of the Bay Hawk which he uses in his commercial fishing operation; that the Bay Hawk was under the supervision and control of Petitioner's employees; that, although Petitioner was not on board the Bay Hawk when it docked at Petitioner's fish house, he did arrive at the dock a short time later aboard another commerical fishing boat owned by Petitioner; that both Petitioner and his employee each refused to grant permission to the game protectors involved to inspect without a search warrant the locked cabin of the Bay Hawk, although such inspection is authorized by Ohio statutory law; and that Petitioner himself placed a new lock on the Bay Hawk cabin door after the game protector, having obtained a search warrant, had cut off the lock to inspect the cabin. Thus, Petitioner's Statement of the Case is grossly inadequate in setting forth the facts supporting his conviction, as determined by the lower courts.

After the unsuccessful appeal through the state court system, Petitioner sought habeas corpus relief in federal district court which precipitated the proceeding herein. As is pertinent to this proceeding, the petition for a writ of habeas corpus was denied for the reasons that, as concluded by the district court, (1) questions going to the weight and sufficiency of evidence adduced at a criminal trial which results in a conviction are generally not cognizable in a federal habeas corpus proceeding unless the record is totally devoid of evidentiary support, and the record in this case is *not* devoid of evidentiary support that Petitioner had constructive possession of the "illegal" fish; and (2), to the extent that Petitioner contends that Section 1531.02 of the Ohio Revised Code imposes strict criminal liability and allows imposition of criminal sanctions absent a finding of *scienter,* or guilty knowledge, the imposition of strict liability in the instant case does not violate Petitioner's constitutional right to due process of law. In making this latter determination, the district court recognized the Respondent's contention that there is sufficient evidence in the record from which the "guilty knowledge" of the Petitioner might be inferred, but for the sake of argument, assumed that the statute in question imposed strict criminal liability. (Petitioner's App., p. ii.) Although the district court denied Petitioner's application for a writ of habeas corpus, the court granted Petitioner's motion for a certificate of probable cause.

The United States Court of Appeals for the Sixth Circuit, upon review, affirmed the order of the district court for the reasons stated by the district court in its opinion. (Petitioner's App., pp. i, ii.) Although the court of appeals did indicate that its principal reason for affirmance was that federal review by habeas corpus of a criminal conviction in a state court does not extend to the sufficiency of the evidence, the court's order does indicate, contrary to Petitioner's assertion in his Statement of the Case, that it adopted all the reasons stated by the district court. It is this Order of the Sixth Circuit Court of Appeals that Petitioner requests this Court to review upon certiorari.

ARGUMENT

I. Questions relating to the weight and sufficiency of evidence adduced at a state criminal trial, resulting in a criminal conviction, are not subject to federal review by habeas corpus.

Upon reading Petitioner's application to this Court for a writ of certiorari, it is difficult to understand exactly what issue is being raised by Petitioner. As presented by Petitioner, the issue is vague, and further, to the extent that an issue is raised at all, it is based upon an assumed factual situation which does not reflect the actual state of facts in the case at bar. In stating the issue, Petitioner submits that his conviction is based *solely* upon his ownership of a commercial fishing boat. Such is simply not the case. The full extent of the evidence adduced at trial supporting Petitioner's conviction, as set forth in the Statement of the Case herein, is chronicled in the district court's Order denying Petitioner's application for a writ of habeas corpus (*Reynolds v. Wetli,* Civil No. 75-431 (N.D. Ohio, entered March 31, 1977), reproduced in Petitioner's Appendix at p. ii, and hereinafter referred to as "Order"). Petitioner's conviction is supported by more than just his ownership of the Bay Hawk.

In view of his attempt to minimize the evidence adduced at trial and to construe the evidence as inadequate, Petitioner's submission that his conviction is based solely upon his ownership of the Bay Hawk can only be viewed as an attempt to induce this Court to review the sufficiency of the evidence in the context of a federal habeas corpus proceeding. The Sixth Circuit Court of Appeals refused to conduct such a review, as did the district court below. It is well settled that questions going to the weight and sufficiency of evidence adduced at a criminal trial which results in a criminal conviction are generally not cognizable in a federal habeas corpus proceeding. *See, Harlan v. McGourin,* 218 U.S. 442 (1910); *Perkey v. Cardwell,* 369 F. Supp. 770 (S.D. Ohio, 1973), *aff'd,* 492 F. 2d 1244 (6th Cir. 1974); *Cunha v. Brewer,* 511 F. 2d 894 (8th Cir.), *cert. denied,* 423 U.S. 857 (1975); *Young v. Alabama,* 443 F. 2d 854 (5th Cir. 1971), *cert. denied,* 405 U.S. 976 (1972); *Phillips v. Pitchess,* 451 F. 2d 913 (9th Cir. 1971), *cert, denied,* 409 U.S. 854 (1972); *Mathis v. Colorado,* 425 F. 2d 1165 (10th Cir. 1970). In the instant case the evidence adduced at trial was reviewed by the Ohio Court of Appeals and the court concluded that the record reveals facts proving beyond a reasonable doubt that Petitioner was guilty of the unlawful possession of undersized fish. *State of Ohio v. Reynolds,* Case Nos. 74-202, 74-203, 74-204 (C. A. Ohio, Lucas Cty., February 28, 1975). Reviewing the record upon Petitioner's application for a writ of habeas corpus, the district court below determined that the record is

not "totally devoid" of evidentiary support for Petitioner's conviction. (Petitioner's App., p.v.) The court of appeals below affirmed the district court conclusion that federal review by habeas corpus does not extend to sufficiency of the evidence. These determinations are in accord with the decisions of this Court and of the various circuit courts. Accordingly, to the extent that Petitioner is requesting this Court to review the sufficiency of the evidence, he has presented no basis justifying the granting of the instant petition for a writ of certiorari.

II. The imposition of strict criminal liability for the unlawful possession of undersized fish is not violative of the constitutional guarantee to due process of law under the Fifth and Fourteenth Amendments.

Petitioner attempts to argue that the question presented is more than just a consideration of the sufficiency of the evidence, that there has been a violation of his constitutional rights to due process of law as well as to equal protection under the law. To the extent that Petitioner is arguing that he was denied due process of law for the reason that his conviction was allegedly based upon a determination that, due solely to his ownership of the Bay Hawk, he had possession of the "illegal" fish found on his boat while it was engaged in a commercial fishing operation, his argument is really no more than a contention, as verbalized by the district court below in its Order, that Section 1531.02 of the Ohio Revised Code imposes strict liability and allows imposition of criminal sanctions absent a finding of *scienter*, or guilty knowledge, and therefore violates his rights under the due process clause of the Fifth and Fourteenth Amendments. The district court, affirmed by the court of appeals, concluded that there had been no violation of Petitioner's constitutional rights. These decisions are clearly correct.

There is no question but that a statute may impose strict criminal liability without being constitutionally infirm. As Justice Harlan indicated in *Chicago B. & Q. Ry. v. United States*, 220 U.S. 559, 578 (1911):

> The power of the legislature to declare an offense, and to exclude the elements of knowledge and due diligence from any inquiry as to its commission, cannot, we think, be questioned.

See also, *United States v. Balint*, 258 U.S. 250 (1922).

On the facts of the instant case, the Ohio Court of Appeals in effect, as construed by the district court below in its Order (Petitioner's App., p. iv), upheld the imposition of criminal liability absent proof of guilty knowledge or *scienter*. In affirming Ohio's construction of its criminal laws relative to the protection, conservation, and management of the state's wildlife resources, the decisions of the district court and the court of appeals are not inconsistent with the decisions of other federal courts under similar circumstances.

In *United States v. Jarman*, 491 F. 2d 764 (4th Cir. 1974), the defendants had been convicted of violating a law designed for the protection of wildlife which prohibited the hunting of game birds on and over a baited area. On appeal defendants argued, *inter alia*, that *scienter* should be made a part of the offense. Rejecting this argument, the court stated at 491 F. 2d, 766:

> Courts have held, repeatedly, however, that Congress may create a crime and omit *scienter* as an element so that even an unknowing violation will support a conviction. And this is especially true, as here, where the offenses charged have no common law origins. United States v. Dotterweich, 320 U.S. 277, 64 S. Ct. 134, 88 L. Ed. 48 (1943); United States v. Balint, 258 U.S. 250, 42 S. Ct. 301, 66 L. Ed. 604 (1922); United States v. Schultze, 28 F. Supp. 234 (W. D. Ky, 1939). Cf. Morrissette v. United States, 342 U.S. 236, 72 S. Ct. 240, 96 L. Ed. 288 (1952).

In accord are *United States v. Ireland*, 493 F. 2d 1208 (4th Cir. 1973), and *United States v. Tarmon*, 227 F. Supp. 480 (D. Md. 1964).

The import of these decisions is that strict liability is a proper standard for criminal liability and the lack of *scienter* as an element of a criminal statute designed to preserve wildlife does not give rise to a constitutional question. Thus, the decisions below of the court of appeals and the district court, concluding that Petitioner has not suffered any deprivation of due process under the law, are clearly correct.

In contrast, Petitioner has presented no authorities in support of his Petition. Petitioner's argument is founded simply on his conclusory statement that the concept of convicting one "for possession of fish held by another is vicarious criminal liability for possession of non-contraband substances" and is not supported by decisions of this or any other court. First of all, the concept of strict criminal liability in matters pertaining to the protection, conservation, and management of wildlife resources *is* supported by other courts as indicated above. Petitioner has presented no authorities demonstrating the decision herein of the court of appeals to be in conflict with the decision of any other court of appeals on this matter. Secondly, whether or not to impose strict criminal liability under the circumstances herein is a matter of Ohio law to be determined by the courts of Ohio. The instant case does not present an important, indeed, any question of federal law, nor has the court of appeals decided an important state question in conflict with the applicable state law. Finally, even if Petitioner's conclusory argument were accepted, it is not applicable to the instant case because it is inaccurate. Petitioner suggests that he has been held criminally liable for the possession of "non-contraband substances." To the extent that "contraband," as that term is generally understood, includes property the possession of which is a crime, [1] the undersized fish in the instant case are clearly contraband property since Ohio law makes it unlawful to possess certain named species of fish under a specified size. Even so, Petitioner has cited no authority to support his conclusory statements. In sum, Petitioner has presented no special or important reasons why this court should grant the petition for a writ of certiorari.

[1] See, e.g., Rule 41 (b) of the Ohio Rules of Criminal Procedure (and also Rule 41 (B) of the Federal Rules of Criminal Procedure) which provides that a warrant may be issued to search for and seize any "(2) contraband, the fruits of crime, or things otherwise criminally possessed."

III. Petitioner's conviction for the unlawful possession of undersized fish is not violative of the equal protection clause of the Fifth and Fourteenth Amendments.

Petitioner submits that there is "an equal protection aspect to this case arising from the effect of Ohio decisional law." In support of his argument Petitioner merely cites two Ohio cases. A brief analysis of those cases, however, shows that the argument is simply without merit.

In *Ohio v. Williams*, 94 Ohio App. 249 (Sandusky Cty., 1952), the court determined that the imposition of criminal liability upon truck drivers hauling fish for the unlawful possession of undersized fish was unconstitutional without proof of *scienter*. In *Ohio v. Euclid Fish Co.*, 32 Ohio Op. 2d 85 (C. A. Cuyahoga Cty., 1964), the court similarly determined that criminal liability without proof of *scienter* cannot constitutionally be imposed for the unlawful possession of undersized fish upon the owners of said fish under circumstances where the fish had been imported from Canada in sealed crates. On their facts, these cases are fundamentally different from the case at bar for these cases involve the application of Ohio law to *different* classes of persons. The instant case does not involve the conviction of a truck driver hauling goods, i.e., fish in sealed crates, nor does it involve the conviction of the owner of fish which were imported from outside Ohio. Rather, it involves the conviction of a licensed commercial fisherman for the unlawful possession of undersized fish while engaged in commercial fishing operations. Indeed, in both *Williams* and *Euclid Fish Co.*, the court explicitly distinguished the facts under consideration therein from the situation, as here, where undersized fish were found on a commercial fishing boat. Finally, upon Petitioner's motion to reconsider, the Ohio Court of Appeals explicitly determined that *Williams* and *Euclid Fish Co.* are not applicable to the case at bar.

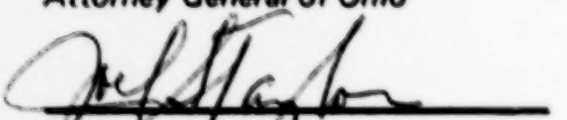
In conclusion, Petitioner has failed to raise any substantial federal question or to demonstrate any special or important reasons why this Court should grant the petition for a writ of certiorari.

CONCLUSION

Rule 19(1) of the Rules of the Supreme Court of the United States sets forth guidelines for granting a petition for a writ of certiorari. The general thrust of these guidelines is that a writ of certiorari will be granted only where "there are special and important reasons therefor." None of the arguments presented by Petitioner are within the specific guidelines ennumerated in Rule 19(1) nor do said arguments present any other special or important reasons for granting the petition. As discussed in the Argument above, the reasons asserted by Petitioner are woefully inadequate to justify the issuance of a writ of certiorari to the Sixth Circuit Court of Appeals in this matter. For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Brief for Respondent in Opposition were served upon Joseph L. Newman, Counsel for petitioner, at 740 Leader Building, Cleveland, Ohio 44114, by ordinary mail, first class postage prepaid, this 10 day of February, 1978.

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